IN THE HIGH COURT OF JUDICATURE AT BOMBAY

CIVIL APPELLATE JURISDICTION.

FIRST APPEAL NO.554 OF 1993.

Shri Haibati Mahadeo Mane & Anr.: Appellants

versus

Haridas Krishna Pawar & Anr. : Respondents.

Mr.Prasad Rane i/by R.V.More for the appellants.

Mrs.Urmial K. Sanil for Respondent No.2.

CORAM : D.G.DESHPANDE,J.

DATED : 24th February 2005.

ORAL ORDER

1. Heard the advocates. This appeal is filed by the the owner of the vehicle and the alleged driver. The accident took place between the tempo and the victim who was going by the bicycle. He suffered injuries on account of the

accident. He filed claim petition for Rs.One lac before the Motor Accident Claims Tribunal, Sangli. The claim petition was partly allowed. The Insurance Company - Respondent No.2 was exonerated and, therefore, this appeal.

2. It was the contention of the counsel for the appellants that, firstly, there is no evidence on record to show that Respondent No.1 - driver was driving the vehicle. Secondly, he contended that the owner - Respondent No.2 had taken specific stand that the driver was not driving the vehicle and one person by name Manik was driving the vehicle. Thirdly, according to him, whether Manik had licence or not was for the Insurance Company to prove. He relied upon the judgment of the Supreme Court reported in **2004 ACJ 1 (National Insurance Co. Ltd. v. Swaran Singh and ors.)** wherein the Supreme Court has laid down in para 102 - Summary of Findings and, held in clause (iv) as,

> "(iv) The insurance companies are, however, with a view to avoid their liability must not only establish the available defence(s) raised in the said

> proceedings but must also establish 'breach' on the part of the owner of the vehicle, the burden of proof wherefor would be on them."

3. This ruling will have some bearing on the issue involved only if the appellants proved that at the time of accident, Respondent No.1 was not driving the vehicle. It is true that the owner as well as the driver have taken the stand that the Appellant No.1 was not driving the vehicle. But their defence is of negative type. As against this, the victim has specifically stated in his evidence the manner in which the accident took place. How Respondent No.1, after the accident, tried to run away; how he was chased and when the tempo stopped at the signal, he was questioned. The claimant, who was examined as witness No.2 for the petitioner, identified Respondent No.1 as the person driving the tempo and in the report i.e. in the F.I.R. lodged he has also given the name of Respondent No.1.

4. This is, therefore, a case where there is positive and assertive evidence of the claimant

and, nothing could be brought on record, from his cross examination on behalf of both the appellants, to show that the claimant had any reason to falsely named Appellant No.1 as a person driving the tempo. Therefore, as against this negative evidence of the appellants, who were obviously, interested in avoiding the liability and putting the entire blame upon somebody-else, the positive evidence of the victim has to be accepted by the Court and, in that case, burden would shift upon the owner of the vehicle to show that the Appellant No.1 had a licence. Nothing in that regard was brought on record to show that the appellants had driving licence issued in his favour.

5. It is true that as per the judgment of the Supreme Court referred to above the burden of showing the breach is on the Insurance Company. But that burden can be discharged by the circumstances proved or brought on record, and it is not in every case, the Insurance Company should adduce evidence about the breach. When the court has to come to the conclusion that the vehicle was being driven by the Appellant No.1 at the crucial time, in view of the aforesaid

circumstances, then it was for the owner of the vehicle and also the driver to prove that he had a valid driving licence on the date of accident. In the absence of any evidence, the trial court was justified in exonerating the Insurance Company. No interference is called. Appeal is dismissed.

[D.G.DESHPANDE]

24/02/2005 JUDGE.